NG CHEE YEW SDN BHD & ORS A

v.

IJM CORPORATION BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR B
HAMID SULTAN ABU BACKER J
[ORIGINATING MOTION NO: R-25-294-2007]
15 OCTOBER 2009

ARBITRATION: *Arbitrator - Revocation of appointment - Applicants' complaints involved procedural matters and directions relating to arbitration - Whether basis for removal of arbitrator - Whether appropriate to allow arbitrator to proceed or on the court's own motion to direct 2nd respondent to proceed with claim filed in High Court - Whether arbitrator's continued presence and authority seen to be an act of miscarriage of justice - Arbitration Act 1952, ss. 3, 24, 25, 26* C D

The 2nd respondent filed an action against the applicants in relation to a construction dispute in the Seremban High Court. The dispute was stayed by the applicants themselves pending the matter being referred to arbitration, pursuant to an order of court E dated 9 June 2000. The applicants were then represented by M/s Skrine & Co and appointment of arbitrator was done by consent and the arbitration proceeded. While the arbitration process was progressing with hearings and delays, M/s Skrine discharged themselves. Because of various delays, the arbitrator issued pre- F emptory order to expedite the proceeding. The appointment of new solicitors were slow and even after the appointment, the new solicitors was not in a position to immediately proceed with the proceeding and sought adjournments which were given. Subsequently the applicants filed an application to remove the arbitrator (encl. 1) G citing various grounds involving procedural matters and directions relating to the arbitration. The applicants also alleged that the arbitrator failed to disclose that he was restrained by an injunction dated 21 September 2000 from continuing with the arbitration proceedings pending disposal of an application for his removal for misconduct in a previous arbitral proceedings *vide* an Order dated 7 H January 2005. In addition the applicants sought costs against the arbitrator although the arbitrator was not made a party to the proceeding. As such, the arbitrator applied to intervene in the proceeding. The application of the arbitrator to be made a defendant *ie*, respondent in the application was allowed, with the consent of I

A the applicants themselves. The respondent objected to Enclosure 1 on the grounds that (i) the applicants were authors of their own misfortune as they failed or refused to act promptly to engage new solicitors despite being forewarned by the arbitrator (ii) both the applicants' new counsel should not have accepted the brief if they B were unable to comply with the hearing dates which had been fixed more than one year earlier. (iii) both the applicants' previous solicitors, M/s Skrine, and the 2nd respondent's solicitors had, by consent, mutually agreed to the appointment of the arbitrator, the procedure and the commencement of the hearing; (iv) the C applicants' allegations were baseless, devoid of any merit and *mala fides* and designed to delay and scuttle the arbitration; (v) the arbitrator acted fairly, impartially and even-handedly between both parties. When both parties did not agree on the adjournment or procedure, the arbitrator heard both parties and exercised his sole discretion to decide and determine on the matter.

D

Held (revoking the authority of the arbitrator and ordering that the arbitration agreement shall cease to have effect with respect to the dispute referred):

E **(1)** It was the applicants, *ie*, the defendants in the High Court suit who obtained a stay to proceed with arbitration. The applicants being respondent in the arbitration proceeding had protracted the proceedings. The complaints of the applicants relating to procedural conduct of the arbitration proceedings cannot, as a F general rule, be a basis for the removal of the arbitrator. The complaints of the applicants are matters which essentially fall within the jurisdiction of the arbitrator. Each and every complaint directly or indirectly involves procedural matters and directions relating to arbitration. Courts will not ordinarily G interfere with procedural decisions of the arbitrator. *Engineering Environmental Consultants Sdn Bhd v. Sime UEP Development Sdn Bhd* (refd); *Majlis Perbandaran Shah Alam v. Menara Biru Sdn Bhd & Anor* (refd). (paras 6 & 8)

(2) Both parties were given reasonable opportunity to present each H other's case. It was the applicants' own lackadaisical attitude towards the arbitration proceedings, which led the arbitrator to be firm and assertive to ensure expeditious disposal of the proceeding. The arbitrator cannot be blamed for taking necessary steps to expeditiously conduct the proceeding. The I applicants' allegation that the new solicitors need time to prepare the case has no bearing on the facts of the case because the law does not require arbitration proceeding to be

conducted by a judge or parties to be represented by solicitors and appointment of new solicitors whether in the civil court or in arbitration, during the course of proceeding is not a valid ground for adjournment. (para 8)

(3) The complaint of misconduct by the arbitrator in the instant proceeding had no basis on the facts of the case. The allegation of failure to inform that the arbitrator has been removed for misconduct was erroneous as the said misconduct was not related to fraud, deceit etc: Misconduct is often used in technical sense to refer to irregularity and/or failing to adhere to principle of natural justice and not the moral turpitude of the arbitrator. The arbitrator acted within his scope and jurisdiction professionally and without any breach of rules of natural justice. On the facts of the case, the conduct of arbitrator *per se* in the arbitration proceeding does not warrant the interference of the court. *Bremen Vulkan v. South India Shipping* (refd). (para 8)

(4) Although the applicants had not made out a case for the removal of the arbitrator on the facts of the case it was necessary and expedient for the court to exercise its inherent jurisdiction to make such necessary orders and directions. Reading the relevant affidavits, it was difficult for any reasonable mind to conclude that the arbitrator's continued presence and authority would not be seen to be an act of miscarriage of justice. If the arbitrator continued to hear the pending arbitration proceeding, the ultimate award may be liable to be set aside. The court in hearing an application for removal of arbitrator etc; can make various orders. These are specifically stated in ss. 3, 24 to 26 of the Arbitration Act 1952. It will be a proper exercise of discretion in this case to revoke the authority of the arbitrator and order that the arbitration agreement shall cease to have effect with respect to the dispute referred. Accordingly, the authority of the arbitrator is revoked; the arbitration agreement shall cease to have effect with respect to the dispute referred; the 2nd respondent is at liberty to file the necessary application in the Seremban High Court and proceed to set down the action for trial. (paras 6 & 8)

Case(s) referred to:

Bremen Vulkan v. South India Shipping [1981] Lloyds 909 HL ***(refd)***

Engineering Environmental Consultants Sdn Bhd v. Sime UEP Development Sdn Bhd [2009] 1 LNS 619 HC ***(refd)***

Majlis Perbandaran Shah Alam v. Menara Biru Sdn Bhd & Anor [2009] 6 CLJ 694 HC ***(refd)***

Legislation referred to:
Arbitration Act 1952, ss. 3, 14(3), 24, 25(1), 26

Other source(s) referred to:
Hudson, *Building and Engineering Contracts*, 11th edn, p 1649
Mustill & Boyd, *Law and Practice of Commercial Arbitration in England,* 1982, pp 475, 476

For the plaintiffs - Matthias Chang (Manjit Singh Sachdev & David Ho with him);
For the defendant - T Shanmugaraj; M/s Ngae Shan Kalai & Co
For the intervener - Ernest Azad; M/s Ernest Azad & Assoc

Reported by Susheila Sreedharan

JUDGMENT

Hamid Sultan Abu Backer J:

[1] This is my judgment in respect of the plaintiffs' application encl. 1 to remove the arbitrator in a pending arbitration proceeding. The applicants' prayer *inter alia* reads as follows:

(i) That the arbitrator, Mr. Sundra Rajoo be removed from further acting as arbitrator in the arbitration proceedings pursuant to s. 24 of the Arbitration Act 1952; and/or

(ii) In the alternative, that leave be given to the applicants to revoke the authority of the arbitrator Mr. Sundra Rajoo pursuant to s. 3 and/or s. 25 of the Arbitration Act 1952; and/or

(iii) In the alternative, the said arbitrator Mr. Sundra Rajoo be removed from further acting as arbitrator in the arbitration proceedings as the applicants have lost all confidence in the impartiality of the said arbitrator and/or his capability of conducting the said arbitration fairly; and/or

(iv) That the said arbitrator Mr. Sundra Rajoo be restrained from proceeding with the arbitration proceedings pursuant to s. 25(1) of the Arbitration Act 1952;

(v) That a new arbitrator be appointed in place of Mr. Sundra Rajoo and the appointment be made by the Director of the Kuala Lumpur Regional Centre for Arbitration or in the alternative, by this Honourable Court, pursuant to s. 26 of the Arbitration Act 1952;

(vi) In the alternative, that the arbitrator be removed pursuant to s. 14(3) of the Arbitration Act 2005;

(vii) That such further or other orders and/or relief may be made as this Honourable Court deems fit and;

(viii) That the costs of this application be paid by the arbitrator Mr. Sundra Rajoo and/or the respondents, to the applicants.

[2] The claimant in the arbitration was the 2nd respondent but the applicants have also made the 1st respondent as a party to this application which the 2nd respondent seriously objects. In addition the applicants have sought costs against the arbitrator in the terms set out in prayer 8 which must be seen to be unusual, as the arbitrator was not made a party to the proceeding and such conduct will appear to be an abuse of the process of court. In consequence, the arbitrator found it necessary to intervene in the proceeding for limited purpose of informing the court as to why he should not be penalised in costs. The application of the arbitrator to be made as a defendant ie, respondent in the application was allowed, with the consent of the applicants themselves.

Brief Facts

[3] The 2nd respondent has filed an action against the applicants in relation to a construction dispute in High Court, Seremban. The said dispute was stayed by the applicants themselves pending the matter to be referred to arbitration, pursuant to order of court dated 9 June 2000. The applicants were then represented by M/s Skrine & Co and appointment of arbitrator was done by consent and the arbitration proceeded. While the arbitration process was progressing with hearings and delays, M/s. Skrine discharged themselves. Because of various delays, the arbitrator had issued pre-emptory order to expedite the proceeding. The appointment of new solicitors were slow and even after the appointment, the new solicitors were not in a position to immediately proceed with the proceeding and sought adjournments which were given. Subsequently the applicants filed an application for the removal of the arbitrator. The grounds have been summarised by the applicants *inter alia* as follows ie, Mr. Sundra Rajoo had misconducted the arbitration proceedings:

a) By placing upon himself the autonomy to decide on the manner and procedure in the conduct of the proceedings and applicants, in total disregard of the pressing and warranted requirements and wishes of the applicants and in contravention of the rules of natural justice;

A b) By imposing or compelling the 3rd applicant to conduct the cross-examination of the 2nd respondents' 1st witness in the absence of the applicants' solicitors and counsels and to force the parties to comply with his unreasonable directions, thereby humiliating and embarrassing the 3rd applicant, who is also a B key witness for the applicants;

c) By directing the applicants' current counsel Mr. Manjit Singh Saini to conduct the cross-examination of the 2nd respondents' 1st witness even after the said counsel had informed the said Arbitrator that he was only retained late in the afternoon of the C previous day and had no opportunity to confer with the applicants' representatives and/or to examine any of the documents and exhibits. The conduct of the said arbitrator in the circumstances was unreasonable and did not serve the interests of justice;

D

d) By setting the matter down for hearing when case management has yet to be finalised as there has been no Agreed Bundle of Documents and/or Statement of Agreed Facts. Certain contract documents have not even been included in the Bundle of Documents. As at 18 August 2006, the applicants' solicitors E were still disputing with the 2nd respondents' solicitors on the issue of documents to be included in the Bundle of Documents and the Inspection and Discovery thereof. Disputes with regard to certain documents continued till 4 September 2007. This unacceptable state of affairs still subsists till date.

F

e) In the circumstances, it was unreasonable and irrational for the said arbitrator to direct the commencement of the arbitration hearing way back in 2006 and for continued hearing in 2007, when the disputes over the primary and critical documents have G not been resolved by the parties.

f) There have been no proper notes of proceedings and none has been made available to the parties. When Mr. Manjit Singh Saini, counsel for the applicants requested for the Notes of Proceedings, he was informed by the said Arbitrator that his H (the said arbitrator) Notes of Proceedings are "confidential" and not available to the parties and that the parties must rely on their respective Notes of Proceedings. This is gross misconduct and a total failure to comply with all of the accepted and established procedures in arbitration proceedings, as there must I be a common set Notes of Proceedings, inclusive of the transcripts of all witnesses' testimonies.

g) By conducting themselves in such manner the applicants and their counsel no longer have any confidence in the impartiality and integrity of the said arbitrator. The applicants have lost all confidence in the ability of the arbitrator to act within the ambit of the law and in his impartiality in the conduct of future hearings.

h) Notwithstanding the fact that at the present stage of the proceedings where the 2nd respondent has only called their first witness to testify and a second witness to be called in due course to give evidence) the said arbitrator has arbitrarily and in total disregard for the need to ensure that the best evidence are made available, disallowed the applicants' right to call for expert witnesses on the ground that the applicant is out of time.

i) Notwithstanding the consent of the solicitors for the applicants and the 2nd respondent that approximately 131 days be allocated for the entire arbitration hearing, the said arbitrator has an inherent duty to ensure that the said arbitration be conducted efficiently and expeditiously. In failing to discharge that duty, the said arbitrator has subjected both parties to suffer inordinate delays and unnecessary cost and expense as well as added legal cost. To date, the arbitrator has requested for and was paid a sum of RM94,000 by each party and has on 18 September 2007, requested both parties to pay an additional sum of RM114,000 each on or before 22 October 2007. Such exorbitant costs and protracted hearings entirely defeat the purposes of an arbitration, as arbitration has always been recommended as a speedier and a speedier and cost effective means of dispute resolution.

j) Alternatively, the applicants rely on s. 14(3) of the Arbitration Act 2005 in that the said arbitrator Mr. Sundra Rajoo failed, neglected and/or refused to disclose to the parties herein at the time of his appointment and/or all subsequent deliberations, meetings and hearings that he had been restrained by an injunction dated 21 September 2000 from continuing with the arbitration proceedings pending the disposal of an application for his removal for misconduct. The said arbitrator was removed by the High Court of Malaya at Kuala Lumpur as an arbitrator on the grounds of misconduct in a previous arbitral proceedings *vide* an order dated 7 January 2005.

[4] The 2nd respondent objects to the 1st respondent to be made a party to this application as the arbitration was initiated by the order of court relating to the 2nd respondent and the applicants only. And says: (i) all evidence in the documents eg. letter of award, recital in articles of agreement, financial advance agreement, guarantee, minutes of meetings, letters and cheques by the applicants refer to the second respondent only (ii) the applicants' course of dealings with the second respondent raises an estoppel and the applicants cannot resile from their position of having dealt with the second respondent only.

[5] The respondent summarises the objection to the application as follows (i) the applicants are authors of their own misfortune. They failed or refused to act promptly to engage new solicitors despite being forewarned by the arbitrator (ii) both the applicants' new counsel should not have accepted the brief if they were unable to comply with the hearing dates which had been fixed more than one year earlier. Their attempts to adjourn the hearing were not *bona fide* (iii) both the applicants' previous solicitors, M/s Skrine, and the second respondents' solicitors had, by consent, mutually agreed to the appointment of the arbitrator, the procedure and the commencement of the hearing; (iv) the applicants' allegations are baseless, devoid of any merit and *mala fides*. These allegations are designed to delay and scuttle the arbitration. If the court appoints a fresh arbitrator, time and expense would be wasted; (v) the arbitrator acted fairly, impartially and even-handedly between both parties. When both parties did not agree on the adjournment or procedure, the arbitrator heard both parties and exercised his sole discretion to decide and determine on the matter. There is no suspicion of bias or likelihood of bias by the arbitrator.

And asserts that the application must be dismissed with costs.

Preliminaries

[6] In the instant case it is crucial to note that it was the applicants, ie. the defendants in the High Court suit who obtained a stay to proceed with arbitration. The facts will also show that the applicants being respondent in the arbitration proceeding had protracted the proceedings. The complaints of the applicants relating to procedural conduct of the arbitration proceedings cannot, as a general rule, be a basis for the removal of the arbitrator. In the instant case, the arbitrator had intervened in the proceedings to protect his interest. However, the affidavits filed by the parties have become unruly and lack candour, courtesy and fairness taking into consideration the profession involved. In the interest of justice, this

requires the court to consider whether it will be appropriate to allow the arbitrator to proceed or on the facts of the case on the courts own motion to direct the 2nd respondent to proceed with his claim in the High Court, Seremban, and for that purpose make the necessary application before the High Court in Seremban, in suit No. 22-128-1999. And the High Court, Seremban to have the liberty to grant suitable orders or direction as it deems fit taking into consideration the conduct of parties and the suitability of arbitration proceeding.

[7] All such order or directions can be made in the interest of justice as invited by the applicants' prayer (vii). The learned authors Hudson's *Building and Engineering Contracts*, 11th edn, p. 1649 says:

> It has been stated *supra*, that an arbitrator's appointment can be revoked or an arbitrator's agreement set aside on the ground of an arbitrator's misconduct. This may involve a wide range of matters, varying from unfair and unjudicial behaviour to mistaken actions or decisions where no moral turpitude or professional incompetence is involved, but where in the interests of justice the arbitration should not continue. It will be seen that examples of unfair and unjudicial behaviour have been reaching the reports more frequently in recent times.

[8] I have read the application, affidavits and submissions of the parties in detail. I take the view that the applicants have not made out a case for the removal of the arbitrator but on the facts of the case it is necessary and expedient for the court to in addition exercise its inherent jurisdiction to make necessary orders and direction stated below. My reasons *inter alia* are as follows:

(a) One of the objects of arbitration is for speedy and expeditious disposal of the dispute. In the instant case it was the applicants who obtained the stay of the civil suit to proceed with arbitration. The facts also reveal that it was the applicants who had protracted the arbitration proceedings. The complaints of the applicants are matters which essentially fall within the jurisdiction of the arbitrator. Each and every complaint directly or indirectly involves procedural matters and directions relating to arbitration. Courts will not ordinarily interfere with procedural decisions of the arbitrator. I have dealt with this area of law and jurisprudence in *Engineering Environmental Consultants Sdn Bhd v. Sime UEP Development Sdn Bhd* [2009] 1 LNS 619; *Majlis Perbandaran Shah Alam v. Menara Biru Sdn Bhd & Anor* [2009] 6 CLJ 694, I do not wish to repeat the same.

(b) From the reading of the affidavits it is quite clear that both parties were given reasonable opportunity to present each other's case. It is the applicants' own lackadaisical attitude towards the arbitration proceedings, which led the arbitrator to be firm and assertive, all, for one purpose ie, to ensure expeditious disposal of the proceeding. The arbitrator cannot be blamed for taking necessary steps to expeditiously conduct the proceeding. The applicants' allegation that the new solicitors need time to prepare the case has no bearing on the facts of the case for various reasons:

(i) the law does not require arbitration proceeding to be conducted by a judge or parties to be represented by solicitors.

(ii) if solicitors take briefs in a proceeding which has commenced, they do not have privilege of adjournments on the grounds that they are busy or occupied in other courts etc. They either accept the brief and continue the proceeding or reject the brief. Appointment of new solicitors whether in the civil court or in arbitration, during the course of proceeding is not a valid ground for adjournment.

(c) The complaint of misconduct by the arbitrator in the instant proceeding has no basis on the facts of the case. And the allegation of failure to inform that the arbitrator has been removed for misconduct is erroneous as the said misconduct was not related to fraud, deceit etc: Misconduct is often used in technical sense to refer to irregularity and/or failing to adhere to principles of natural justice and not the moral turpitude of the arbitrator. Support for the proposition is found in a number of cases.

(d) In the instant case, I have no hesitation in concluding that the arbitrator has acted within his scope and jurisdiction professionally and without any breach of rules of natural justice. On the facts of the case and the conduct of arbitrator *per se* in the arbitration proceeding does not warrant the interference of the court. In *Bremen Vulkan v. South India Shipping* [1981] Lloyds 909, HL at p. 985, Lord Diplock had this to say:

> I turn then to consider what the mutual obligation of the parties are in a private arbitration. By appointing a sole arbitrator pursuant to a private arbitration agreement which does not specify expressly or by reference any particular procedural rules,

> the parties make the arbitrator the master of the procedure to be followed in the arbitration. Apart from a few statutory requirements under the Arbitration Act 1950, which are not relevant to the instant case, he has a complete discretion to determine how the arbitration is to be conducted from the time of his appointment to the time of his award, so long as the procedure he adopts does not offend the rules of natural justice.

(e) On the issue whether the arbitrator should be removed, in the interest of justice; I have given much thought to this issue and considered the submission of the learned counsel for the arbitrator who had asserted that it is proper for the arbitrator to intervene, when there is an application for his removal to ensure that court will not have before it a one-sided version of the events that may lead to injustice against the arbitrator. And relies on *"Law and Practice of Commercial Arbitration in England, 1982"* by the learned authors Mustill and Boyd, where at pp. 475 and 476 they have stated as follows:

> In any case where an application is made to remove an arbitrator, the arbitrator should be notified of the application, and given the opportunity to place before the court any comments which he may wish to make on the grounds of application. This is particularly important where there is reason to believe where the application may not be strenuously resisted; since otherwise the court may be presented with a one-sided version of events, and may in all good faith embody this version in a judgment, the publication of which could do serious harm to the arbitrator's personal and professional standing.

(f) In the instant case the arbitrator has not restricted the issues to costs only but over and above has dealt with other issues and defended his position in the proceeding. And reading the relevant affidavits, it is difficult for any reasonable mind to conclude that the arbitrator's continued presence and authority will not be seen to be an act of miscarriage of justice. If he continues to hear, the ultimate award may be liable to be set-aside.

(g) The court in hearing an application for removal of arbitrator etc; can make various orders. These are specifically stated in ss. 3, 24 to 26 of AA 1952. It will be a proper exercise of discretion in this case to revoke the authority of the arbitrator and order that the arbitration agreement shall cease to have effect with respect to the dispute referred.

[9] For reasons stated above, I make the following orders and directions:

(i) The authority of the arbitrator is revoked;

(ii) The arbitration agreement shall cease to have effect with respect to the dispute referred;

(iii) The 2nd respondent be at liberty to file the necessary application in High Court, Seremban, Civil Suit No. 22-128-1999 and proceed to set down his actions for trial;

(iv) The applicants to pay the 1st and 2nd respondent costs in the sum of RM20,000;

(v) The applicants to pay the intervener/defendant costs in the sum of RM10,000;

(vi) The arbitrator be at liberty to tax his costs for work done in the arbitration proceeding and recover the same according to law from the relevant parties.

[10] I hereby order so.